

98-002

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

Hamilton County Sheriff,

Respondent.

Case No. 96-ULP-11-0622

POHLER, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") upon exceptions and responses to a Hearing Officer's Proposed Order issued on August 26, 1997. For the reasons below, we find that the Hamilton County Sheriff ("Sheriff") committed an unfair labor practice and violated Ohio Revised Code ("O.R.C.") § 4117.11(A)(1) by issuing a Special Order on September 26, 1996 that changed the practice of detectives working holidays after the Fraternal Order of Police, Ohio Labor Council, Inc. ("FOP") would not concede to the Sheriff's proposal on holidays.

I. BACKGROUND¹

The Sheriff and the FOP were parties to a collective bargaining agreement that expired in December 1996 and that covered approximately 220 employees, including approximately 21 detectives in the Sheriff's Criminal Investigations Division ("CID"). Article 23, Section 23.3 of the parties' collective bargaining agreement states: "Non-continuous operations employees shall normally not be scheduled to work on a scheduled holiday." Under the contract, the detectives would get 120 hours deposited into their "Bank" at the beginning of each year, of which 80 hours were for holidays since there were 10 designated holidays in the contract. If the detectives worked the holiday, they would not lose eight hours from their "Bank" and would be paid at the holiday rate in the contract. In December of each year, a detective could receive pay for any hours remaining in the "Bank." Under a Special Order issued by Raymond W. Hulgin, then

¹Finding of Fact Nos. 3-16.

Chief of Detectives, circulated through the normal administrative process and posted on the bulletin board within the CID on January 1, 1992, the detectives would be scheduled to work the holidays unless they asked for a holiday off at least 48 hours prior to the holiday. The detectives have been permitted to schedule themselves to work certain holidays since 1985.

On August 7, 1996, during contract negotiations between the parties, the Sheriff made a proposal to remove Columbus Day as a holiday and replace it with the day after Thanksgiving. On or about August 7, 1996, Thomas McDonald, a detective with the Sheriff's Office and a bargaining-unit member represented by the FOP, was approached by Captain Coyle. Captain Coyle, the Chief of the Detectives in CID directly under Colonel Hoffbauer, is not a member of the FOP or in a bargaining unit. Colonel Hoffbauer reports directly to the Sheriff. Captain Coyle told Detective McDonald that the Sheriff really wanted the FOP to agree to the Sheriff's proposal so that this bargaining-unit's schedule would match the non-union employees' holiday schedule. Captain Coyle expressed concern that the FOP would object to the Sheriff's proposal and that its objection would hurt the FOP members in the long run. Detective McDonald relayed Captain Coyle's concerns to Corporal Robert Wessler, a member of the FOP negotiating team.

Captain Coyle told John Hinrichs, another detective on the 1996 FOP negotiating team, that Hinrichs needed to get it across to management and to the union negotiating team that the detectives were not opposed to the Sheriff's holiday proposal. Captain Coyle expressed to Hinrichs the concern that if the FOP did not agree with the Sheriff's proposal, the detectives would lose their holiday-pay structure. On September 6, 1996, the FOP made a counterproposal to the Sheriff's proposal. The FOP's counterproposal would maintain Columbus Day as a holiday and add the day after Thanksgiving as an additional holiday.

On September 26, 1996, Colonel Hoffbauer issued a Special Order that changed the holiday policy so that the detectives would not be scheduled to work any holidays. This Special Order has the potential of making the detectives lose a total of 80 hours per year from their "Bank" without being able to work and receive holiday pay as before. At the morning briefing on September 27, 1996, Colonel Hoffbauer made an appearance for the first time in a few months. Colonel Hoffbauer announced that the Special Order was about the change in the holiday policy. He pointed to Corporal Wessler and stated that it was Corporal Wessler's fault the detectives lost their holiday-pay structure. After the September 26, 1996 Special Order was issued, two detectives requested a meeting with the Sheriff in an attempt to get the Special Order rescinded. The Sheriff said he would research the issue and scheduled another meeting. At the second meeting, the Sheriff told the detectives that the Special Order was issued for budgetary reasons and that if he had known earlier that the detectives were working holidays he would have stopped that practice sooner.

II. DISCUSSION

A. The Sheriff Violated O.R.C. § 4117.11(A)(1)

O.R.C. § 4117.11(A)(1) states in pertinent part:

- (A) It is an unfair labor practice for a public employer, its agents, or representatives to:
- (1) Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Ohio Revised Code[.]

SERB has established a standard for the appropriate inquiry into whether an O.R.C. § 4117.11(A)(1) violation occurred. This inquiry is objective, rather than subjective; neither the employer's intent nor the individual employees' subjective view of the employer's conduct would be considered by SERB in determining whether an O.R.C. § 4117.11(A)(1) violation has occurred; and a violation will be found if, under the totality of the circumstances, it can be reasonably concluded that the employees were interfered with, restrained, or coerced in the exercise of their O.R.C. Chapter 4117 rights by the public employer's conduct.² Applying this standard to the case at issue, we find that the Sheriff interfered with, restrained, or coerced employees in their O.R.C. § 4117.03(A)(4) right to collectively bargain with the employer in violation of O.R.C. § 4117.11(A)(1) when the Sheriff changed his long-standing policy of holiday schedules for detectives after the FOP took a contrary position during contract negotiations.

The Sheriff argued that issuing the September 26, 1996 Special Order was within his contractual rights. This argument is irrelevant to the case at issue.³ Interference, restraint, and coercion are not acts themselves but are descriptive and are the result of acts. Acts having the effect of interference, restraint, and coercion are included in those terms and are, therefore, prohibited by the statute. Thus, acts that normally could be done validly — *e.g.*, the exercise of legitimate rights under a collective bargaining agreement — may result in a finding of unlawful behavior when they interfere with, restrain, or coerce employees in the exercise of lawful collective bargaining

² *In re Springfield Local School Dist. Bd. of Ed.*, SERB 97-007 (5-1-97); *In re Pickaway County Human Services Dept.*, SERB 93-001 (3-24-93), *aff'd sub nom. in SERB v. Pickaway Human Services Dept.*, 1995 SERB 4-46 (4th Dist. Ct. App., Pickaway, 12-7-95)

³ We are not determining here whether the Sheriff has the right under the collective bargaining agreement with the FOP to make this change in policy since this issue is not relevant to an O.R.C. § 4117.11(A)(1) violation. The Sheriff's right to make this change is not at issue; the result of these acts is at issue.

rights in violation of O.R.C. Chapter 4117.⁴

The record shows that the Hamilton County Sheriff through his agent, the Chief of Detectives, had an established written policy issued in a Special Order in 1992 under which each detective was scheduled to work on holidays unless the individual detective notified the employer 48 hours in advance that the detective wished to take off a certain holiday. This policy enabled the detectives, when they so wished, to work on holidays, to get paid the holiday rate, and to keep their holiday hours in the "Bank." The record also shows that during the 1996 negotiations for a successor collective bargaining agreement the Sheriff issued a Special Order under which, effective immediately, the detectives would not be scheduled to work on any holiday listed in the collective bargaining agreement. This Special Order, if enforced for an entire year, could cause every detective to use 80 of the 120 hours in their own "Banks" that the individual detective might not have used under the 1992 policy. This policy change directly affected the wages, hours, terms and conditions of employment of the detectives.

As part of the negotiations for a successor agreement, the Sheriff presented a proposal to the FOP on August 7, 1996 that would remove Columbus Day as a holiday and substitute the day after Thanksgiving as a holiday. After the Sheriff put this proposal on the table, innuendoes, warnings, and threats were then made to coerce the detectives to agree to the Sheriff's holiday proposal. On or about the same day the Sheriff made his proposal, Captain Coyle approached Detective McDonald, a bargaining-unit member, to warn the FOP that objecting to the Sheriff's proposal would hurt them. On or about this same date, Corporal Wesseler, a member of the FOP bargaining team, was told by Sergeant Boeing that there was a good chance the detectives could lose their holidays if they did not agree to the Sheriff's proposal. Likewise, Detective Hinrichs, also on the FOP negotiating team, was told by these two higher-ranking officers that Corporal Wesseler was not coming across the right way to the FOP negotiating board regarding the Sheriff's proposal. Captain Coyle and Sergeant Boeing strongly suggested to Detective Hinrichs that he should have some input with the FOP negotiating board before the FOP presented its counterproposal to the Sheriff. Captain Coyle also expressed concern that the detectives would lose their holidays if they did not accept the Sheriff's proposal.

On September 6, 1996, the FOP proposed keeping Columbus Day as a holiday and adding the day after Thanksgiving as a holiday. What followed was the carrying out of the innuendoes, warnings, and threats. The Sheriff issued a Special Order prohibiting detectives from being scheduled to work holidays. Moreover, if the correlation between the FOP's refusal to concede to the Sheriff's

⁴ See, e.g., *NLRB v. Grower-Shipper Vegetable Assn. of Central California*, 122 F.2d 368 (9th Cir. 1941) and *NLRB v. Superior Tanning Co.*, 117 F.2d 881 (7th Cir. 1941).

proposal and the punitive Special Order might have been overlooked by someone, Colonel Hoffbauer made it absolutely clear. He made a rare appearance at the detectives' morning briefing session the day after the issuance of the Special Order and proclaimed it was the fault of Corporal Wessler, as an FOP bargaining-team member, that the detectives lost their holiday-pay structure. Bargaining-unit members and FOP bargaining-team members who were told that they would suffer the consequences if they did not concede to the Sheriff's holiday proposal were told the truth by their superiors. Within 20 days of submitting the counterproposal, the detectives lost their holiday-pay structure. These statements by the superior officers and the Sheriff's action in issuing the Special Order were overtly threatening and punitive in nature and were clearly tied to the exercise of protected rights — the right to bargain collectively with the employer. The right to bargain collectively includes refusing to concede to proposals, to make counter-proposals, and to negotiate without being interfered with, restrained, or coerced when doing so.

Under the totality of the circumstances, we are compelled to conclude that the employees were interfered with, restrained, and coerced in the exercise of their O.R.C. Chapter 4117 rights by the manner and timing in which the Sheriff changed this policy. Thus, the Sheriff violated O.R.C. § 4117.11(A)(1) when he issued the September 26, 1996 Special Order.

B. The Remedy

The remedy requested by the Complainant and the FOP is the issuance of a cease and desist order, the posting of the order, and restoration of hours lost by the detectives from the "Bank" as a result of this Special Order. SERB's broad remedial powers to fashion unfair labor practice remedies are found in O.R.C. § 4117.12(B)(3):

(3) If upon the preponderance of the evidence taken, the board believes that any person named in the complaint has engaged in any unfair labor practice, the board shall state its findings of fact and issue and cause to be served on the person an order requiring that he cease and desist from these unfair labor practices, and take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of Chapter 4117. of the Revised Code.

The statute does not limit SERB to a particular remedy for specific violations in different sections of O.R.C. Chapter 4117. The only requirement is to take such remedial action as will "effectuate the policies of [O.R.C.] Chapter 4117."

In this case the only action which will remedy the wrong, in addition to posting a cease and desist order, is an order from SERB

rescinding the September 26, 1996 Special Order, reinstating the 1992 policy, combined with crediting back to each detective all holiday hours lost as a result of this Special Order. Without ordering the Sheriff to compensate the detectives for their lost hours, the policies of O.R.C. Chapter 4117 will not be effectuated since the lesson the employees will learn is that coercion works and that one loses for standing on one's statutory rights. It has been SERB's policy to develop remedies uniquely adapted to each case.⁵

The remaining issue is how to calculate the number of hours to be restored to each detective. Absolute precision in fashioning a compensation formula is impossible since there is no way to determine who would have worked on which holiday had the Sheriff not implemented the September 26, 1996 Special Order. The general rule is that doubt in back pay calculation should not constitute a circumstance that warrants the denial of back pay and should be resolved against the employer since it is the employer's wrongful conduct that created the situation.⁶

⁵ *In re Princeton City School Dist. Bd. of Ed.*, *supra*.

⁶ *Cruz v. Local Union Number 3 of IBEW*, 34 F.3d 1148, 1157 (2nd Cir. 1994); *Town of Pembroke Park*, 10 FPER ¶ 15001 (FL PERC 11/29/83); *NLRB v. Miami Coca-Cola Bottling Company*, 360 F.2d 569, 572-573 (5th Cir.1966). It should be noted that in *In re Warren County Sheriff*, SERB 94-002(2-9-94) we cited *State ex rel. Hamlin v. Collins*, 9 Ohio St.3d 117, 459 N.E.2d 520 (OH Sup. Ct. 1984) for the proposition that a back-pay award must be based on certainty. However, that case is an action in mandamus where the standard is different and requires a clear legal right. The case at issue is obviously not a mandamus case and hence the certainty requirement is not applicable.

We find that it is appropriate to calculate the average holiday hours that each detective would have had in the "Bank" for comparable periods of time had the 1992 policy not been rescinded. To calculate this remedy, each individual detective's history of holiday hours worked each year since 1992 will be averaged and added respectively to the detective's "Bank" for the period of time from September 26, 1996 to the date the Sheriff rescinds the 1996 Special Order under this SERB order.⁷

III. CONCLUSION

For the reasons above, we find that the Hamilton County Sheriff committed an unfair labor practice in violation of O.R.C. § 4117.11(A)(1) when he issued the September 26, 1996 Special Order that changed the practice of detectives working holidays after the FOP would not concede to the Sheriff's proposal on holidays. The remedy ordered is that the Special Order of September 26, 1996 shall be rescinded and the policy returned to the *status quo ante*, that the Hamilton County Sheriff shall restore any hours to each detective's "Bank" that were deducted therefrom as a result of the implementation of the September 26, 1996 Special Order, and a cease and desist order with a Notice to Employees shall be issued and shall be posted by the Sheriff for 60 days in the usual and normal posting locations where bargaining-unit employees represented by the FOP work.

Gillmor, Vice Chairman, and Mason, Board Member, concur.

⁷ See, e.g., *Town of Pembroke Park, supra, Modesto City Schools and High School District*, 11 PERC ¶ 18092 at 546 (CA PERB ALJ 1987) and *University of California (San Francisco)*, 7 PERC ¶ 14105 at 406 (CA PERB ALJ 1983).